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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

WILLIAM ALBERTSON AND ROSCOE QUINCY PROCTOR, PETITIONERS

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 62–73) is reported at 332 F. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1964 (R. 74). The petition for a writ of certiorari was filed on July 10, 1964, and certiorari was granted on May 17, 1965. 381 U.S. 910. The jurisdiction of this court rests upon 28 U.S.C. 1254(1) and Section 14(a) of the Subversive Activities Control Act of 1950, 50 U.S.C. 793(a).

QUESTIONS PRESENTED

The Subversive Activities Control Act of 1950 provides for the registration of any member of an organization which has been found by the Subversive Activities Control Board to be a "Communist-action organization" and which itself has failed to register under the Act. The Communist Party has been found to be such an organization, but it has not registered. Both petitioners were found by the Board to be members of the Communist Party and were ordered to register. The questions presented are:

1. Whether the orders directing petitioners to register violate their constitutional privilege against self-incrimination.

2. Whether the registration requirements are irrational.

3. Whether compulsory registration unconstitutionally infringes upon the protected rights of free speech and association.

4. Whether petitioners were subjected to bills of attainder or were denied due process of law because they were not permitted to relitigate before the Board its prior finding as to the character of the Communist Party.

5. Whether petitioners have a constitutional right to trial upon indictment, by a jury, and in judicial proceedings on the question whether the Communist Party is a "Communist-action organization" within the meaning of the Act.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Subversive Activities Control Act, 50 U.S.C. 781, *et seq.*, and the applicable regulations are set forth in Appendix A, pp. 49-63, *infra*.

STATEMENT

On May 31, 1962, pursuant to Section 13(a) of the Subversive Activities Control Act of 1950, 50 U.S.C. 792(a), the Attorney General filed petitions with the respondent Board for orders requiring petitioners to register under Section 8(a) of the Act as members of a Communist-action organization, *i.e.*, the Communist Party of the United States of America. The petitions alleged: (1) that a final order requiring the Communist Party to register under Section 7(a) of the Act as a Communist-action organization was in effect (having been published in the Federal Register on October 21, 1961); (2) that more than sixty days had elapsed since the order became final, but the organization had not registered; (3) that petitioners were members of the organization and were therefore required to register under Section 8(a) of the Act; and (4) that petitioners had failed to do so.[1]

Petitioners' answers (R. 5, 33) stated, *inter alia*, that Sections 8 and 13 of the Act violate the Fifth Amendment privilege against self-incrimination

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[1] Petitioners have raised no factual issues pertaining to their membership in the Communist Party. Consequently, we have not set out the allegations or findings made in the course of the Board proceedings. The allegations appear at pages 2-4 and 30-32 of the Record. The Board's findings of fact are at pages 14-24 and 42-50.

(which petitioners "hereby assert[ed]"), as well as the First, Fifth, and Sixth Amendments, and that they deprived petitioners of their constitutional right to trial by jury and constituted a bill of attainder.

After full hearings, at which petitioners offered no evidence (other than one exhibit in the *Albertson* case), the Board found that petitioner Albertson was at the time of the hearing, and had been, since at least 1960, a member of the Communist Party (R. 25). The Board also found that petitioner Proctor was and had been, since at least the end of 1959, a member of the Communist Party (R. 50).[2] The Board also found that a final order requiring the Communist Party to register as a Communist-action organization had been in effect since October 20, 1961, and that the Party had not registered (R. 25, 57). Accordingly, the Board issued orders requiring Albertson (R. 26) and Proctor (R. 58) to register.

Petitioners sought review of these orders in the court of appeals pursuant to Section 14(a) of the Act (R. 27–29, 59–61). The court of appeals affirmed the Board's orders on the ground that the self-incrimination claim was not ripe for review (R. 66–69) and that most of the other contentions were resolved adversely to petitioners in *Communist Party* v. *Sub-*

[2] Each petitioner had been elected a member of the National Committee of the Communist Party at the last National Convention of the Party in December 1959; each served in that office and held various offices at local and State levels in the Party; each attended meetings of National Committee and of local and State groups of the Party at which they reported on and discussed matters of Party policy; and each imparted to members information from the Party leadership with respect to Party programs and activities. See R. 14–24, 42–50.

versive Activities Control Board, 367 U.S. 1 (R. 71–72).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, in its present posture, involves the validity of two orders of the Subversive Activities Control Board, each of which directs one of the petitioners to "register under and pursuant to section 8 (a) and (c) of the Subversive Activities Control Act of 1950, as amended, as a member of the Communist Party of the United States of America, a Communist-action organization * * *" (R. 26, 58). The orders do not prescribe any particular form of registration nor do they direct petitioners to supply any specific information. On their face they require nothing more than bare "registration," and it is in light of this narrow command that their validity must be determined.

We emphasize at the outset what this case does not presently involve because we believe that confusion regarding the effect of the Board's orders has misled petitioners as well as the court of appeals. The forms appended to petitioners' brief (pp. 65–68) are the official forms currently prescribed by the Attorney General for the registration of individuals under Section 8 of the Subversive Activities Control Act. Two separate documents are involved. One is IS–52a, the Registration Form, on which the prescribed act of registration is performed. The second is IS–52, the Registration Statement, on which the registrant is asked to supply personal data and other information. But the Registration Form is not established by statute, and compliance with the registration requirement can, presumably, be achieved by registration in a form

differing from Form IS–52a.[5] Nor have petitioners responded to the specific requests for information contained in either the Registration Form or in the Registration Statement. They have, however, asserted the Fifth Amendment privilege against self-incrimination before the Board in response to the Attorney General's demand that they register. Consequently, we believe that to the extent petitioners contend that any form of compulsory registration adequate to satisfy the standards of Section 8 would violate their Fifth Amendment privilege, their claim is now ripe for adjudication. Insofar, however, as they challenge any particular inquiry made on the Registration Form or Statement, their contention is premature.

The registration provisions of the Subversive Activities Control Act were drawn and enacted "to [e]ffect disclosure of the identity and propaganda of individual Communists and Communist organizations." S. Rep. No. 1358, 81st Cong., 2d Sess. (1950), p. 7. The draftsmen of the Act contemplated that disclosure would be accomplished principally by the registration of Communist-action and Communist-

[5] The Act requires the Registration *Statement* to be "prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe." Section 8(c). But no similar provision exists with regard to the Registration *Form*, so that compliance with the bare registration requirement of the statute could be achieved in a manner other than by Form IS–52a.

front groups with the Attorney General.[4] These groups, being obliged to register under Section 7 of the Act, are required by that Section to accompany their registrations with statements listing, *inter alia*, their officers and, in the case of Communist-action organizations, the names and addresses of all their members. If a Communist-action organization fails to register, the Subversive Activities Control Board is authorized, at the request of the Attorney General and pursuant to an evidentiary hearing, to determine that the organization is legally obligated to register and order it to do so. Section 13 (g) (1). It is only if the organization thereafter fails to comply with such an order[5] that its individual members come under a duty to register personally. If an individual fails to do so, the Board is empowered, again upon petition by the Attorney General, to conduct a public evidentiary hearing to determine whether or not the individual is a member of the organization which has been determined to be a Communist-action organization. If the Board finds "that an individual is a member of a Communist-action organization * * * it shall make a

[4] The history and structure of the Act was discussed in detail in our brief in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, No. 12, O.T. 1960, at pp. 45–84. For the convenience of the Court we have reprinted that discussion (with some revisions) as Appendix B, pp. 64–98, *infra*.

[5] The order is judicially reviewable and does not become final until after appellate proceedings are concluded. Section 14.

report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under [Section 8] * * *." Section 13(g)(2).

Registration is the linchpin which holds together the statutory mechanism. Section 9 of the Act empowers the Attorney General to maintain public registers containing (1) the names and addresses of Communist-action and Communist-front organizations, (2) the registration statements and annual reports of such organizations, and (3) the registration statements of individuals registered as members of Communist-action organizations. Nothing in the Act empowers the Attorney General to include in such registers or lists any unregistered organizations or individuals, even if they have been determined to be Communist-action organizations, or members of such organizations, by the Board. In other words, the act of registration—whether voluntary or compelled—is both the necessary and sufficient condition for inclusion on the Attorney General's registers. And the registers are the means chosen by Congress to effectuate the public disclosure which was deemed necessary.

1. Petitioners' claim that the registration requirement violates the Fifth Amendment privilege against self-incrimination is premature in part, and is otherwise unsound on the merits. To the extent that petitioners fear that responses to specific inquiries on the Registration Form or Statement may compel them to incriminate themselves, they must claim the privilege with respect to the particular questions on the forms—

a step which they have not yet taken. Consequently, all that is involved at this stage is the question whether the bare act of registration and the requirement that they submit the form and statement encroaches upon Fifth Amendment rights. Since compulsory registration is not an admission of any kind, much less a confession of criminal conduct, the signing of petitioners' names does not subject them to any danger of incrimination. Moreover, Section 4(f) of the Act explicitly manifests Congress' intention not to have the act of registration available as an admission in any criminal prosecution. And since registration follows a Board determination that the registrant is a member of a Communist-action organization, mere registration "as a member" cannot supply any "investigatory lead" for further incriminatory evidence.

2. There is no merit to petitioners' argument that the registration requirement is irrational. Congress may well have believed that both those who register voluntarily and those who do so under compulsion should be required personally to perform the act. Furthermore, the registration requirement is a means whereby to obtain further information through the accompanying Registration Statement, and to keep the list current by requiring notification of changes of addresses.

3. No First Amendment liberties are impaired by the registration requirement. Contrary to petitioners' contention, the act of registration is not a compelled declaration of political belief. Nor is the disclosure attendant upon registration any more of a discourage-

ment to free and lawful association with Communist-action groups than the membership-disclosure requirement imposed on the organization itself, which this Court sustained in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1.

4. The Board was not required to permit petitioners to relitigate the status of the Communist Party, which had been adjudicated in 1953 in the Board proceeding involving that organization. The Act requires individual members of noncomplying Communist-action groups to register, and the finding regarding the organization's status is deemed binding in proceedings involving individual members. Any other course would be grossly impractical. In light of the manifold problems which would arise in the administration of the Act if such findings could be relitigated, the Board could reasonably assume that, in the absence of any showing to the contrary, its initial finding remained valid.

5. The claim that petitioners should be granted a jury trial on the underlying facts found by the Board in this proceeding and in the *Communist Party* case are premature at this juncture. Petitioners have not yet been charged with failing to obey the Board's orders. In any event, such a rule would be contrary to established principles of administrative law. Those who are charged with having violated orders of administrative agencies which have been reviewed and affirmed in the courts are not entitled to relitigate the validity of the underlying orders in their criminal trials.

ARGUMENT

I

COMPELLED REGISTRATION UNDER SECTION 8 DOES NOT VIOLATE PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners' first contention is that the orders directing them to register pursuant to Section 8 encroach upon their Fifth Amendment privilege against self-incrimination (Br. 15–32). The court of appeals rejected this claim as premature because denial of the privilege had not been "pressed to the point of criminal prosecution" (R. 69). We believe, for the reasons stated below, that petitioners' self-incrimination claim is premature only to the extent that it is broadly asserted to bar any and all inquiries made on the Attorney General's registration form and accompanying statement. However, insofar as petitioners resist the Board's power to compel them to register under the statute and the general statutory authority to require them to submit a statement, their assertion of the privilege is ripe for adjudication. On its merits, the claim is unsound because the "registration" contemplated by the statute—when done under compulsion of a Board order based upon independent evidence of membership—is a neutral act which cannot incriminate the registrant. And while petitioners may be able to assert valid claims of privilege to particular questions on the accompanying registration "statement"—or, indeed, to information requested on the registration form itself—they cannot, by invoking the privilege at the outset, avoid the obligation of responding

to the questions and asserting the privilege with regard to specific inquiries.

A. PETITIONERS' ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IS PREMATURE TO THE EXTENT THAT IT RELATES TO POSSIBLE INQUIRIES ON THE REGISTRATION FORM AND STATEMENT

This case arises out of review proceedings instituted by petitioners to set aside administrative orders requiring them to register pursuant to provisions of federal law directing registration "as a member of [a Communist-action] organization" and the submission of registration statements. In answer to the Attorney General's petition for a Board order directing registration in compliance with the statute, petitioners expressly asserted their Fifth Amendment privilege against self-incrimination (R. 5, 33). The Attorney General's petition did not request nor did the Board's order command that any particular inquiries be answered or that specific information be supplied. Petitioners are now seeking review of orders which merely direct them to "register" and to submit a statement. They have not claimed the constitutional privilege with respect to any particularized request for testimony; the only specific act that the statute prescribes is that each "register with the Attorney General as a member" of the Communist-action organization, and that the registration "be accompanied by a registration statement." Sections 8(a), 8(c). Obviously petitioners cannot claim any privilege beyond what they have been ordered to do, and to the extent that their claim anticipates inquiries

made on the registration form or statement, it is premature. *Rabinowitz* v. *Kennedy*, 376 U.S. 605, 610. The prematurity of the claim in this regard becomes apparent if the various possibilities which may render it purely hypothetical are considered.* First, the registration forms may be altered by the Attorney General before petitioners are finally compelled to register. Second, the Attorney General (or his delegate, see p. 58, *infra*) may accept as sufficient registration for purposes of the statute a document which does not comply, in every detail, with Forms IS–52 and IS–52a. Third, if and when a claim of privilege is made with respect to some specific request for information contained on the forms, the Attorney General may decide, in light of "his personal perception of the peculiarities of the case" (*Ex parte Irvine*, 74 Fed. 954, 960, quoted in *Hoffman* v. *United States*, 341 U.S. 479, 487), to honor the claim.

Nor, in the present posture of the case, is a court which is called upon to rule on the validity of petitioners' claims of privilege able to perform its function—to determine "[a]s to each question to which a claim of privilege is directed * * * whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." *Rogers* v. *United States*, 340 U.S. 367, 374. Petitioners have not, for example, specifically invoked the Fifth Amendment privilege with regard to their pres-

*In enumerating these contingencies we lay to one side the possibility that petitioners will not assert the privilege with regard to each and every question. That, too, is a condition which renders the claim premature at this juncture.

ent business and residence addresses or with respect to the inquiry concerning their dates of birth. Whether or not this identifying information presents "a reasonable danger of further crimination in light of all the circumstances * * *" (*ibid.*) can and should be determined not when the privilege is asserted, as it is here, in anticipation of a whole range of questions which *may* be asked in the future. At that point the controversy is entirely hypothetical, and the surrounding circumstances which are relevant in assessing the merits of any privilege claim are still unknown.

Petitioners now occupy, we believe, the same position as witnesses summoned by an administrative agency to testify or to produce documents. Such witnesses may "challenge the summons on any appropriate ground" and assert "constitutional or other claims" in an enforcement proceeding instituted by the agency (*Reisman* v. *Caplin*, 375 U.S. 440, 449, 445), even if they are under no immediate danger of suffering criminal punishment for disobedience of the summons. See, for example, *United States* v. *Powell*, 379 U.S. 48, and *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, where challenges to administrative orders of this sort were considered on their merits even though the agency had not yet pressed its demand for information "to the point of criminal prosecution" (R. 69). And this Court's approval in *Reisman* v. *Caplin*, 375 U.S. 440, 445, of decisions such as *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (C.A. 2), and *Falsone* v.

United States, 205 F. 2d 734 (C.A. 5), which involved the doctor-patient privilege and an accountant's claim of privilege, demonstrates that it is permissible to assert testimonial privileges at this juncture if all conceivable complying disclosures would violate such a privilege. See also *Shaughnessy* v. *Bacolas*, 135 F. Supp. 15, 17–18 (S.D. N.Y.).[1]

But that does not mean that a witness who has been summoned by an agency to testify or to produce records may employ a testimonial privilege as a threshold bar to all inquiry merely because some of the questions which will probably be asked would encroach on a constitutionally privileged area. Even if the witness has good reason to believe that incrim-

[1] Such challenges are, of course, unavailable at this stage if the governing statute contains no provision for judicial review prior to the institution of a criminal proceeding for disobedience. In Selective Service cases, for example, where Congress has determined that dispatch in the processing of registrants is of paramount importance, orders of the administrative boards are not reviewable at any time before the registrant engages in the conduct made criminal by statute. *Falbo* v. *United States*, 320 U.S. 549, 554–555. Consequently, any claim made prior to the criminal proceeding is "premature" under the statutory scheme. In the present case, however, the statute provides for judicial review of a Board order to register, and it stays the effective date of the order until the review proceedings are completed. Section 14(b). Hence the claim made here, like any other contention that the order is invalid, may be heard and determined by the reviewing court. The same distinction explains the rule applicable to district court orders to witnesses to testify in proceedings before the court or grand jury. Such orders are simply not appealable at that juncture; consequently, claims of privilege must await the review of a contempt judgment. *Alexander* v. *United States*, 201 U.S. 117; *Cobbledick* v. *United States*, 309 U.S. 323.

inatory information will be sought, he must comply with the summons and assert the privilege as the questions are asked. *In re Turner*, 309 F. 2d 69, 71–72 (C.A. 2); *Application of Daniels*, 140 F. Supp. 322, 328 (S.D.N.Y.); *Shaughnessy* v. *Bacolas*, 135 F. Supp. 15, 17 (S.D.N.Y.); *In re Minker*, 118 F. Supp. 264, 266 (E.D. Pa.), reversed on other grounds, 217 F. 2d 350, affirmed *sub nom. United States* v. *Minker*, 350 U.S. 179; see *Hubner* v. *Tucker*, 245 F. 2d 35, 42 (C.A. 9); *Marcello* v. *United States*, 196 F. 2d 437, 441 (C.A. 5). As this Court observed in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 108: "[I]t is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to evade them without expressly asserting that his answers may tend to incriminate him." See, also, *Hutcheson* v. *United States*, 369 U.S. 599, 619.

Under these principles petitioners' claims of privilege are now ripe for adjudication only to the extent that they challenge the Board's power to compel the bare act of registration and the submission of an accompanying statement. With respect to these two requirements, petitioners have expressly asserted the privilege and these claims have been overruled by the Board's orders directing them to register and to submit the accompanying statements. Those decisions of the Board, like its underlying findings that petitioners

are members of Communist-action organizations, can be fully considered and determined by a reviewing court and are relevant to the ultimate question to be decided by such a court—whether the Board's order ought to be affirmed or set aside. Section 14(a).

We disagree, therefore, to this limited extent, with the court of appeals' conclusion that petitioners' self-incrimination claims are premature. In *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 105–110, upon which the court below relied, no actual claim of privilege had ever been made by any individual. This Court's holding that the claim of self-incrimination was premature was based on the observation that "[t]here is no indication that in the past [the Communist Party's] high-ranking officials have sought to conceal their identity, and no reason to believe that in the future they will decline to file a registration statement whose whole effect, in this regard, is further to evidence a fact which, traditionally, has been one of public notice." 367 U.S. at 107. Hence the claim that registration would encroach on individual Fifth Amendment rights was entirely hypothetical. Here, however, the privilege against self-incrimination has been distinctly invoked with regard to registration and submission of statements by specific individuals who were proceeded against by the Attorney General, and the Board has overruled these claims. We agree that there is no reason to defer until some future criminal prosecution the question

whether coerced compliance with the Board's order would violate the asserted constitutional rights.[8]

B. NEITHER COMPULSORY REGISTRATION *PER SE* NOR THE OBLIGATION TO SUBMIT A "STATEMENT" VIOLATES PETITIONERS' PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioners' contention that compulsory registration violates the constitutional privilege against self-incrimination rests on the premise that "the Act, the Board's orders and the forms and regulations of the Attorney General compel petitioners to acknowledge that they are members of the Communist Party" (Br. 21–22). For the reasons stated above (pp. 12–14, *supra*), we believe that what may be compelled by the forms of the Attorney General is not involved in this case at the present juncture. The presently rele-

[8] We also note that if the orders to register and to submit statements are affirmed, petitioners will not be compelled "to risk life sentences if they are to secure a determination of their constitutional rights" (Pet. Br. 18) with respect to the specific inquiries on the registration form and statement. The Act provides a five-year term of imprisonment and a $10,000 fine for "failure to * * * register or to file any * * * registration statement * * *." Section 15(a)(2). It is doubtful whether an individual who had registered and filed a statement but was contesting the validity of certain claims of privilege made on the form could be said to have "failed" to register or file. Cf. *Reisman* v. *Caplin*, 375 U.S. 440, 446–447. In any event, the provision which authorizes the cumulation of penalties states that "each day of failure to *register*, whether on the part of the organization or any individual, shall constitute a separate offense." (Emphasis added.) Consequently, the failure to file a Registration Statement—which is distinguishable from a failure to register—is not separately punishable for each day. Accordingly, even if a mistaken claim of privilege to a single question were deemed a failure to file the statement, it could be punished by not more than five years imprisonment and a $10,000 fine.

vant inquiry is only whether the Act—with which petitioners have been directed to comply by the Board's orders—requires petitioners to make any admission which could be self-incriminatory. If neither the bare act of registration nor the submission of the statement can incriminate a registrant in any conceivable manner, it follows that the claim that these orders infringe Fifth Amendment rights must be rejected.

1. *Registration.*—At the outset, we believe it important to note a critical distinction between the registration scheme established by the Subversive Activities Control Act and registration provisions of other statutes which have been subjected to constitutional challenge. *United States* v. *Kahriger,* 345 U.S. 22, and *Russell* v. *United States,* 306 F. 2d 402 (C.A. 9), concerned statutes which defined a class of persons required to register, and it was asserted there—as here—that compulsory registration by such individuals would require them to make disclosures which could be used against them in criminal proceedings. In both *Kahriger* and *Russell,* however—unlike this case—criminal penalties were prescribed for those who failed to come forward and register voluntarily. In other words, members of the class subject to the registration requirement were put to the assertedly unconstitutional choice (held impermissible in *Russell*) of making a self-injurious disclosure or risking criminal punishment for their silence.[9]

[9] In *Kahriger,* a majority of the Court held that the disclosure was not the sort protected by the Fifth Amendment because it dealt with future, and not past, acts. 345 U.S. at 32.

The Subversive Activities Control Act authorizes no such "squeezing device." *United States* v. *Kahriger*, 345 U.S. 22, 36 (Black, J., dissenting). An individual who does not volunteer to register is not required to make any disclosure whatever, nor can he be punished for merely having failed to come forward. The sole remedy provided by the Act is a proceeding before the Board to compel the individual to register, and in that proceeding the burden of proving membership in the statutory class is on the Attorney General. Criminal penalties for failing to register are authorized only with respect to those who have been found, by a preponderance of the evidence, to be members of the class, and these penalties cannot come into play until after the findings have been sustained by the courts to which review is sought. Hence, registration cannot be used as a means of coercing persons who have concealed their membership in Communist-action groups to come forward—under threat of criminal punishment—and make self-damaging disclosures. Only those whose membership the Attorney General can prove in Board proceedings (and on judicial review) can be compelled to register against their will.[19]

[19] The same cannot be said of the statutes involved in *Kahriger* and *Russell*. It is true that no individual may be successfully prosecuted under those statutes unless the Attorney General possesses information establishing his membership in the class. But the danger of criminal prosecution may induce otherwise unwilling members of the class to come forward and register. Under the instant Act, however, there is no danger of immediate criminal prosecution; the reluctant member may therefore want to see what the Attorney General can prove in the Board proceeding.

In these circumstances, it cannot be claimed, we believe, that compelled registration amounts to coerced self-incrimination. The individual who, like petitioners here, has been found on evidence presented by the Attorney General to be a member of a Communist-action group is making no "injurious disclosure" (*Hoffman* v. *United States*, 341 U.S. 479, 487) when he registers, pursuant to a court-affirmed Board order, as a member of a Communist-action group. First of all, the bare act of registration in compliance with a Board order based on a finding of membership is not an admission of any kind and could not be used against the registrant in any way. Second, Section 4(f) of the Act manifests Congress' intention that the act of registration not be considered an admission by the registrant for the purpose of any criminal prosecution. And finally, in light of the antecedent finding of membership on which a registration order must be based, it is impossible for the mere act of registration to provide any "leads" from which the government could derive incriminatory evidence.

a. The entire statutory scheme is inconsistent with the notion that compulsory registration "as a member" of a Communist-action group may serve as an admission of membership. Apart from Section 4(f), which we discuss below (pp. 24–26, *infra*), it would be quite extraordinary to suppose that Congress intended to pry damaging admissions from unwilling members of Communist-action groups by creating a procedure whereby the very fact which these individuals are to be coerced into admitting (*i.e.*, membership) must first

be established before the Board by a preponderance of evidence *aliunde* any such admission.

The sole purpose of registration, we submit, is to place the name of the registrant on the public list which the Attorney General is required to keep pursuant to Section 9(a) of the Act. Since the Act was designed around a voluntary registration system with which, it was contemplated, the affected organizations and their members would comply, it was consistent with its basic structure to provide for the personal registration of unwilling as well as willing individuals. With respect to the latter Congress could, of course, have achieved the same result by empowering the Board to register all those found by it to be members of non-complying Communist-action organizations, and such a course would clearly have avoided the self-incrimination claim made here. But since, as we contend, the act of registration is no more incriminatory if done by the individual than if done by the Board itself, petitioners cannot assert the constitutional claim as a bar to enforcement of the Board's orders directing them to engage in the act themselves.

Involuntary registration "as a member" of a Communist-action group imports no actual admission of membership; it is nothing more than compliance with an administrative order directing registration. If, for example, the statute authorized the Board to take, for a public record, the fingerprints of any individual found to be a member of a Communist-action organization, submission to fingerprinting could not be deemed privileged under the Fifth Amendment. The act of signing one's name to a registration form is, we submit, materially indistinguishable.

Indeed, the statute prescribes no particular registration form. While it does specify that registration be "as a member" of the Communist-action organization, it might well be sufficient for someone in petitioners' position to comply by signing his name to an acknowledgment that he is registering "pursuant to the order of the Subversive Activities Control Board" in his case.[11] Since it is not the purpose of the Act to coerce confessions from members of Communist-action organizations,[12] it makes no difference to those charged with its administration whether the particular language used by persons compelled to register is or is not framed in terms of an admission. And, in any event, an individual who signs Form IS–52a (Pet. Br. 65) is not, on the face of that document, necessarily admitting that he *is* a member of a Communist-action organization; he is merely signing his name, under compulsion (which he may indicate on the form itself), as one who has been found to be a member. His signature adds nothing of an incriminatory nature to the underlying Board finding.

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[11] The Attorney General's present form calls for a signature and the registrant's address. The latter item may, of course, be incriminatory under certain circumstances (see *Simpson* v. *United States*, 355 U.S. 7), but whether the privilege may be appropriately claimed here should not be decided until petitioners invoke it on the registration form.

[12] We have no quarrel with the series of decisions involving National Labor Relations Board orders providing for compulsory posting of notices which assertedly compelled respondents to confess to violations of law. See Pet. Br. 39; cf., *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 438–439. Congress did not intend here—any more than it did in those cases—to authorize an administrative agency to extort confessions of wrongdoing.

Moreover, if there were any possibility that the registration form could be so construed as to be used against petitioner as an admission in a criminal proceeding, the well established constitutional rule barring the admission of involuntary confessions would prevent its being utilized in that manner. Those who are compelled by a Board order—enforceable with severe criminal sanctions—to sign a particular registration form can obviously not be said to have admitted voluntarily the truth of what the form contains.[18]

b. It is entirely clear from Section 4(f) of the Act that Congress was not intending to have compulsory registration serve as an admission of any incriminating fact. Section 4(f) provides:

> Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under Section 7 or Section 8 of this title as an officer or member of

[18] Petitioners also maintain that registration amounts to an admission by them that the Communist Party is a Communist-action organization (Pet. Br. 23, 32). It is true that Form IS-52a may be subject to that construction, but nothing in the statute forbids petitioners from inserting qualifying language or otherwise amending the form so as to avoid any danger of self-incrimination. Moreover, since the question whether the organization to which the registrant belongs is a Communist-action organization is not even in issue in this proceeding, his registration on Form IS-52a would not, in our view, be such an admission.

> any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute. [Emphasis added.]

We do not contend that this is an immunity provision which "supplant[s] the privilege" within the meaning of *Counselman* v. *Hitchcock*, 142 U.S. 547, 585. But we do believe that it expresses an unequivocal legislative judgment not to permit the bare act of compelled registration to be used against the registrant in the only fashion in which it could meaningfully hurt him.[14]

Petitioners argue that Section 4(f) does not reach use of "the fact of * * * registration" in a criminal prosecution under Section 15(c) of the Act for violation of Sections 5 and 10 (Pet. Br. 30–32). But this claim is squarely rebutted by the statutory language—which covers its use in "any prosecution * * * for any alleged violation of any other criminal statute." This Court noted in *Scales* v. *United States*, 367 U.S. 203, 211–212, that Section 4(f) was "the product of the fusion of provisions contained in measures conceived by the House and the Senate * * *" and that the basic structure of Section 4 was "the result of the Senate's efforts." Relying principally on the history of the House provisions and the alleged omission of

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[14] Voluntary registration may, of course, be an "investigatory lead" from which other evidence may be derived. See *Scales* v. *United States*, 367 U.S. 203, 211, and n. 6, 217. Compulsory registration is based on a finding of membership, so that registration can obviously produce no new leads. See pp. 26–27, *infra*.

several of them from the Act's final version, petitioners maintain that Congress intentionally left areas in which the "fact of registration" could be used in the criminal prosecution of a registrant (Pet. Br. 69–71). But the history of Section 4 outlined in the *Scales* opinion (367 U.S. at 211–217) demonstrates that the Senate version of that Section—which was the basic framework of the enacted provision—provided no immunity with respect to the "fact of registration" other than for subsections (a) and (c) of Section 4. In conference, the words "or for any alleged violation of any other criminal statute" were added to the Senate version, and the most reasonable interpretation of this addition, we believe, is that it was intended to bring under Section 4(f) all the separate immunity clauses regarding "fact of the registration" contained in the House legislation. The fact that the House conferees did not even advert to any change from the House version in their report on the conference bill indicates that they believed that the substance of the House provisions had been incorporated by the additional language in Section 4(f). See H. Rep. No. 3112, 81st Cong., 2d Sess. (1950).

c. Nor is it conceivable that compulsory registration—even if taken as a declaration by the registrant that he is a member of the Communist-action organization—could provide any investigatory leads to other incriminatory evidence. The Board may order registration only if it has found, by a preponderance of the evidence, that the respondent before it is a member of a non-complying Communist-action organization.

if it has sufficient evidence to support that finding, it cannot possibly be assisted in any further investigation by the registrant's compelled stark admission of membership. Indeed, under these circumstances the statement to which the registrant subscribes presents not only no "real danger" of further incrimination; the hazard is so remote as not even to approach the "mere imaginary possibility" of increased danger of prosecution—which has been held to be insufficient to sustain a claim of privilege. See *Rogers* v. *United States*, 340 U.S. 367, 374–375, quoting from *Heike* v. *United States*, 227 U.S. 131, 144, and *Mason* v. *United States*, 244 U.S. 362, 366.

2. *Submission of a statement.*—The question whether petitioners are protected by the Fifth Amendment self-incrimination privilege against being required to complete and submit the statement which Section 8(c) prescribes is squarely controlled, we believe, by *United States* v. *Sullivan*, 274 U.S. 259. That case concerned a taxpayer who refused, on self-incrimination grounds, to file an income tax return. In reinstating his conviction for failure to file (which had been reversed by the court of appeals) this Court, speaking unanimously through Mr. Justice Holmes, said (274 U.S. at 263–264):

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * It would be an extreme if not an extravagant application of the Fifth Amendment to say that it author-

ized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.

The statute, as incorporated in the Board's orders here under review, requires petitioner to submit a registration statement "to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe." Section 8(c). The prescribed form is IS–52 (Pet. Br. 66–68), and petitioners may—just as the defendant could in the *Sullivan* case—test any particular question "in the return" by asserting the privilege against self-incrimination in response to that question. At the present juncture, however, only the duty to submit the return is at issue (pp. 12–18, *supra*), and that duty is not in conflict with any constitutional principle.

In summary, petitioners' self-incrimination claim amounts to the argument that compelling them to sign their names or to file responses to a questionnaire which includes incriminatory questions violates their Fifth Amendment rights. In light of the fact that the declaration which they are required to sign is neither intended to be nor can be incriminatory, and is not an admission of any kind, they may constitutionally be compelled to sign. In this respect, their "registra-

tion" is no different from the various nontestimonial acts which a criminal defendant may be compelled to perform such as speaking or writing for identification, undergoing a physical examination, being fingerprinted or photographed or trying on an item of clothing which is in evidence. See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245, 252–253; 8 Wigmore, *Evidence* § 2265 (McNaughton Revis. 1961). The registration statement, in other words, is not a meaningful "testimonial disclosure." As a declaration, it does nothing more than identify the registrant as the same man found by the Board to be a member of a Communist-action group. That identifying effect is not within the range of Fifth Amendment protection, particularly not when—as here—identity was admitted in the course of the Board proceedings.

In sum, with respect to self-incrimination, the Act prescribes no more in its present form than if Congress had chosen (1) to allow the Attorney General to "register" all those found by the Board to be members of Communist-action groups and (2) to authorize the Attorney General to interrogate such individuals in person and make their answers public. No self-incrimination objection could be made to either course (except to specific questions asked during an interrogation), and the effect is identical under the presently authorized procedure. Petitioners' own registration is, for any evidentiary purpose, indistinguishable from registration of their names by the Attorney General or the Board or any other government agent. And the obligation to submit a statement is no differ-

ent from a compulsion to appear personally and testify.

II

COMPULSORY REGISTRATION IS A REASONABLE MEANS OF EFFECTUATING THE LEGISLATIVE OBJECTIVE OF PUBLIC DISCLOSURE

Conceding, *arguendo*, that Congress could constitutionally require a Communist-action organization to register and disclose its membership list and that it could also empower an administrative agency to determine and disclose the identity of members if the organization refused to comply with an order that it do so, petitioners argue (Pet. Br. 33–35) that the self-registration aspects of the orders now under review serve no disclosure function and are, therefore, constitutionally invalid. This contention challenges Congress' choice of the means whereby to effectuate public disclosure; it rests on the notion that rather than making personal registration the only condition of inclusion in the Attorney General's public register, Congress should have authorized the Attorney General or the Board to add to that register the name of anyone who is found by the Board to be a member of a Communist-action organization.[15] Since, as we

[15] We do not understand petitioners to be arguing that anything beyond a public Board finding is superfluous. There could hardly be any doubt that there is a purpose in centralizing the roster of those who have officially admitted that they are or have been officially declared to be members of Communist-action groups.

have shown, petitioners are not hurt by the registration requirement and are obliged to make no admissions whatever, they are in no position to complain about Congress' choice of methods. In *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 96–97, this Court commented on a closely related issue: "[T]he legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods."

In any event, the suggestion that there is "no governmental purpose" to support the self-registration requirement overlooks several considerations. *First,* Congress wished to place the major burden of disclosure on the Communist-action organizations themselves and, in case of their noncompliance, on their members. For that reason it chose to make registration the "core of the Internal Security Act" (*Scales* v. *United States,* 367 U.S. 203, 210), and assigned to the Subversive Activities Control Board only the duty of determining whether organizations which failed to register were obliged to do so and whether individuals alleged by the Attorney General to be members were members in fact. The Act contemplated that ultimately, if not immediately, disclosure would result from registration by the organizations or their members without any need for preliminary Board proceedings. This kind of compliance could be achieved only if those whose registration was compelled by the Board were treated no differently than those who

registered voluntarily. If the former could avoid any personal involvement by simply ignoring the Board proceedings, they would obviously not be encouraged to register. If, on the other hand, a nonregistering member is obliged—as he is under the present procedure—to do after a Board proceeding exactly what he should have done initially on his own, others in his position may find it worthwhile to avoid the inconvenience of a Board investigation and register before the Attorney General requests that he be ordered to do so.

Second, the registration procedure is a means of obtaining from the registrant responses to the inquiries on the registration statement. Congress reasonably felt that it was not enough to publish only the names of those who are members of non-complying Communist-action organizations; it authorized the Attorney General to make further inquiries on a registration statement and to make the responses to these inquiries available to the public. The Board's disclosure of its findings cannot result in public knowledge of these additional facts (which a registrant may provide or which he may claim to be privileged as self-incriminatory). It is, of course, true that the act of "registration" *per se* is not justified by the need for this further inquiry. But it was not unreasonable for Congress to attach a registration obligation—which, as we have shown (p. 29, *supra*) is merely identifying—to the obligation to file the statement. Since, in any event, it is necessary that the individual found to have been a member make himself personally available to complete the state-

ment, the registration requirement is hardly a severe "exaction" (Pet. Br. 34).

Finally, personal registration has the virtue of keeping the records current. While Congress might have achieved the same immediate disclosure effect by empowering the Attorney General to compile a list or register of those found to be members of Communist-action organizations by the Board, a list drawn on this basis might rapidly become obsolete because of deaths or changes of address. Under a personal registration procedure, on the other hand, the Attorney General may require notification of any change of address or may compel re-registration at regular intervals. And the fact that the privilege against self-incrimination might be claimed with regard to a registrant's address (see note 11, *supra*) does not mean that such a privilege is always available or that it is invariably asserted. Congress could reasonably have assumed that the advantages of having a current list justified the personal registration requirement—even if some registrants might successfully invoke a privilege with regard to their addresses.[16]

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[16] Petitioners' claim (Pet. Br. 35) that the registration requirement may compel individuals who are not members at the time of registration falsely to state that they are is entirely speculative. The evidence in these cases established that petitioners were highly placed members of the Communist Party. Although we have suggested that petitioner Albertson's case may be moot, petitioner has resisted the suggestion partially on the ground that he has an internal appeal available from the order expelling him. Memorandum for Petitioners, p. 11. Impliedly, therefore, Albertson contends that his status has not changed.

III

THE ACT'S MEMBER REGISTRATION PROVISIONS DO NOT ABRIDGE PETITIONERS' FIRST AMENDMENT LIBERTIES

Petitioners assert two First Amendment objections to the Board orders directing them to register. They claim first that the act of registration amounts to an "affirmation" or "acceptance" of political ideas, and that it is, therefore, the sort of conduct which government may not constitutionally compel (Pet. Br. 37–39). They also contend that registration and public disclosure tend to discourage membership in the Communist Party even on the part of those whose activity is limited to peaceful political advocacy, and that the Act therefore cuts more deeply than necessary into freedom of association (Pet. Br. 39–41). Neither argument is substantial.

A. THE ACT OF REGISTRATION IS NOT A COMPULSORY DECLARATION OF POLITICAL BELIEF

Petitioners' first challenge rests on the premise that by signing the registration form they are affirming or otherwise declaring a prescribed belief in certain political ideas. Petitioners analogize the act of registration to the compulsory declaration of belief held constitutionally impermissible in the "Flag-Salute" cases (*Board of Education* v. *Barnette,* 319 U.S. 624) and to the confessions of wrongdoing required by early orders of the National Labor Relations Board. The statute involved here, however, does not require members of Communist-action groups to sign forms in which they forswear the goals or means of the organizations with which they are associated. If such

a declaration were compelled, the analogy to the flag-salute cases might be persuasive. The provisions involved here are distinguishable from required affirmations of belief in at least three important respects:

First, the form is patently not a declaration of belief of any sort—whether government-supported or government-condemned. It merely reflects an objective fact—membership in a particular organization—which may legitimately be the subject of inquiry by governmental organizations.

Second, unlike the flag-salute or the oath involved in *Torcaso* v. *Watkins*, 367 U.S. 488, the registration form does not compel affirmation of one doctrine (which may be government-supported) rather than another. The registration requirement applies only to those who have been found to be members of Communist-action organizations, and to the extent that they affirm anything, they do so consistently with what has been found to be their associations. They are not, in other words, compelled to make declarations which they consider false or affirmations inconsistent with their beliefs.[17]

Third, the form is not, in our view, a meaningful declaration at all. As we demonstrate above in response to petitioners' self-incrimination claim (pp. 21–24, *supra*), registration under compulsion of a Board order is not to be considered an admission of member-

[17] Petitioners' contention that those who disagree with the Board findings are nonetheless required to certify them as true (Pet. Br. 38) is baseless. A registrant may indicate on the form that he disagrees with or does not accept the Board's findings.

ship or an adoption of the Board's findings. It is merely the formal condition precedent for inclusion in the Attorney General's public register. In this regard, therefore, the present case is distinguishable from the Labor Board orders directing respondents before the Board to confess that they had committed unfair labor practices.

Petitioners' challenge in this regard is really an indirect assertion of the same First Amendment claim made and rejected in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 88–105. If petitioners were asked squarely whether or not they are members of the Communist Party, they might assert a privilege against self-incrimination but would not be heard to claim that a response to the question would be a "declaration of political belief" which could not be compelled consistently with the First Amendment. The registration requirement achieves much the same result as a direct inquiry and, since it follows a finding of membership and may not be used in an incriminatory manner, it is not subject to Fifth Amendment challenges. It is not rendered invalid under the First Amendment merely because it requires petitioners to make a declaration.

B. REGISTRATION AND PUBLIC DISCLOSURE OF ALL MEMBERS OF COMMUNIST-ACTION GROUP IS JUSTIFIED BY THE IMPORTANCE OF REMOVING THE "MASK OF ANONYMITY" OF SUCH GROUPS

Petitioners' alternative First Amendment claim has also been resolved by this Court's decision in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. The Court there held that notwithstand-

ing "the public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization" (367 U.S. at 102), it was constitutionally permissible for Congress to require the organization to make public its membership list because of the particular danger presented by "*foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country" (367 U.S. at 104, emphasis in the original).[18] In other words, the Court held that the danger warranted full disclosure of all members, no matter how innocent an individual member might be and how this might affect future association—for legitimate purposes—with such an organization. If the organization may, consistently with the First Amendment, be compelled to produce a list of all its members, it necessarily follows that there is no First Amendment restriction on similar compulsory public disclosure by the members themselves. Association with the organization for lawful purposes will not be more greatly discouraged by self-registration than by the organization's publication of its membership list.

The argument that only those whose participation in Communist Party activities is sufficient to sustain a Smith Act conviction should be required to register

[18] The Court relied on other registration or reporting decisions such as *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63; *Burroughs* v. *United States*, 290 U.S. 534; *United States* v. *Harriss*, 347 U.S. 612.

(which petitioners impliedly make) misses the point. This Court observed in the *Communist Party* case that the Act was regulatory in nature rather than prohibitory. 367 U.S. at 56. The standard for requiring the regulatory disclosure which the Act prescribes need not, therefore, be the same as the standard governing criminal prosecutions. That an individual required to register may not have engaged in the kind of conduct made criminal by the Smith Act or by the Subversive Activities Control Act does not make registration impermissible. Congress could reasonably conclude that, for disclosure purposes, all members should be encompassed by the statutory classification, since some risk of severe harm is involved whenever any member remains anonymous and the burden of disclosure is not severe. The present statute differs, as this Court noted in the *Communist Party* case, from other membership disclosure or registration situations "in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests." 367 U.S. at 93. These considerations justify Congress' decision to draw the line so as to cover *all* members, not merely those who join in the organization's illegal means and objectives. See *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 710–711.

IV

PETITIONERS WERE NOT DENIED FIFTH AMENDMENT RIGHTS BY THE BOARD'S RELIANCE ON ITS PRIOR DETERMINATION OF THE STATUS OF THE COMMUNIST PARTY

Petitioners argue that they were constitutionally entitled to contest in this proceeding the proposition that the Communist Party was a Communist-action organization (Pet. Br. 42–51). This was a factual issue, they contend, as to which the Board had made its initial finding in 1953, and that finding could not, under the Due Process Clause of the Fifth Amendment, bind individual members ten years after it had been made. The same claim was rejected by the court of appeals in this case (R. 73), in *National Council of American-Soviet Friendship, Inc.* v. *Subversive Activities Control Board*, 322 F. 2d 375, 392 (C.A.D.C.), in *Jefferson School of Social Science* v. *Subversive Activities Control Board*, 331 F. 2d 76, 82 (C.A.D.C.) and in *Weinstock* v. *Subversive Activities Control Board*, 331 F. 2d 75, 76 (C.A. D.C.).

"[D]ue process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." *Moyer* v. *Peabody*, 212 U.S. 78, 84. The Subversive Activities Control Act establishes specific procedures for determining which organizations fall within the class of those required to register. These procedures include full adversary hearings before an expert administrative tribunal and judicial

review of its determinations. The Communist Party was found, pursuant to these procedures, to be a Communist-action organization. Under the Act, the Party was thereupon required to register and disclose its membership. If it failed to do so, its members were to come forward and register personally. The personal obligation of the members is derivative; the Act requires them to register only if they belong to an organization which has failed to comply with a registration order.

Congress was surely justified in adopting this multistage registration scheme and was not constitutionally required to afford each individual member the opportunity to relitigate the question whether the organization to which he belongs is a Communist-action organization. The tortuous history of the *Communist Party* case (367 U.S. at 19–22) demonstrates the total impracticality of permitting such a course in each registration proceeding. Moreover, the Act's failure to provide for relitigation of the organization's status may be considered a statutory presumption that an organization which is once ordered to register retains the same character until such time as it produces evidence before the Board demonstrating that its nature has changed. As this Court observed in the *Communist Party* case (367 U.S. at 69): "Where the current character of an organization and the nature of its connections with others is at issue, of course past conduct is pertinent. Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within

which the implications of present conduct may be known." So long as the Communist Party has not sought to present evidence to the Board to show that it is no longer a Communist-action organization, the Board's judgment based on conduct prior to 1953 may be presumed to be of continued validity.

It is no answer to say that the Communist Party has been unable to relitigate its status because Section 13(b) of the Act allows only registered organizations to apply to the Attorney General and then to the Board for cancellation of registration and redetermination of status. The Party chose not to register and it cannot thereby benefit its members and entitle them to *de novo* considerations of the Party's status. And, in any event, procedures other than Section 13(b) might be used by the Party to bring such new evidence as it has before the Board or to have a court direct the Board to consider such changed circumstances as may exist. The Party has never made any such attempt, and in its absence the Board could constitutionally adhere to its earlier determination.[19]

The rule that no relitigation is permissible does not lend substance to petitioners' additional claim that the individual registration provision of the Act amounts to a bill of attainder (Pet. Br. 36, 46–47).

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[19] The various commentators quoted at pp. 48–51 of petitioners' brief express a point of view which is not inconsistent with the Board's finding that the Communist Party is a Communist-action organization. In any event, they are merely personal views on which the Board might pass if they were properly presented at an appropriate hearing. Standing alone, they surely do not justify a current finding that the Board's 1953 determination is obsolete.

Unlike the statute in *United States* v. *Brown*, 381 U.S. 437, the Subversive Activities Control Act does not designate "members of the Communist Party" as persons subject to its sanctions. 381 U.S. at 450. Instead, the Act involved here "set[s] forth a generally applicable" (*ibid.*) standard in its definition of a Communist-action organization, and it leaves to an administrative agency—to whom Congress has assigned quasi-judicial functions—the task of determining which organizations "possess the specified characteristics" (*ibid.*). The fact that the agency, in an early stage of the registration process, determined that the Communist Party had the required characteristics did not make the Act a bill of attainder. What the Bill of Attainder Clause prohibits is "legislative punishment" (381 U.S. at 447), not a sanction which an administrative agency imposes pursuant to a generally phrased legislative direction. If the Board's action is considered part of the legislative course for purposes of determining whether the Act is a bill of attainder, as petitioners suggest, a Board order directed to a specified individual would be *ipso facto* invalid on that ground. Obviously, therefore, the critical test is whether the statute—not an earlier order of the Board—so specifically defines the class as to run afoul of the Bill of Attainder clause. This Court expressly held in the *Communist Party* case that the Subversive Activities Control Act did not do so. 367 U.S. at 84–87.

V

THE FACT THAT PETITIONERS WILL NOT BE ENTITLED TO A JURY TRIAL ON THE QUESTIONS WHETHER THEIR ORGANIZATION IS A "COMMUNIST-ACTION" ORGANIZATION AND WHETHER THEY ARE MEMBERS DOES NOT INVALIDATE THE ORDERS REQUIRING THEM TO REGISTER

Petitioners' final contention is that the Act is unconstitutional because it does not afford them a trial by jury—in case they disobey the Board's orders—on the factual issues whether the Communist Party is a Communist-action organization and whether they are members. This contention is both premature and unsound.

A. ISSUES RELATING TO THE PROPER PROCEDURES AT PETITIONERS' CRIMINAL TRIAL FOR DISOBEDIENCE OF BOARD ORDERS ARE NOT RIPE FOR DECISION AT THIS JUNCTURE.

This case presently involves two orders of an administrative agency directing petitioners to register, and the orders are based upon findings of that agency. Petitioners may be penalized for violation of these orders only after the findings and the lawfulness of the orders are considered and approved by reviewing courts. Before being subjected to any criminal penalty, petitioners are entitled to a full judicial criminal trial. Whether the issues presented for jury determination in that criminal trial are unconstitutionally circumscribed is a question which must be resolved in that proceeding—if it ever takes place. The court of appeals, therefore, properly rejected this argument as premature (R. 69–70, n. 6).

B. PETITIONERS ARE NOT ENTITLED TO RE-SUBMIT TO THE JURY IN THEIR CRIMINAL TRIAL THE UNDERLYING FACTUAL FINDINGS OF THE BOARD

Petitioners' contention that they are entitled to a full criminal trial on the issues of the Party's status and their membership is inconsistent with basic principles of administrative law. Since the Board's orders to register are not criminal penalties, they can be entered pursuant to an administrative hearing. When and if petitioners refuse to obey the orders without legal justification, they may be tried criminally. It will then be irrelevant whether some error was committed in originally issuing the orders; it will be enough that petitioners have failed to obey final orders. On this issue, petitioners will of course have the full protection of the Fifth and Sixth Amendments. But they will not be able to relitigate the validity of the orders any more than can a person who violates an order of the Federal Trade Commission or of the Interstate Commerce Commission.

The law is replete with instances in which a status or duty is established administratively and is enforced by criminal penalties in case of disobedience. Contrary to petitioners' suggestion (Pet. Br. 54), agencies like the Federal Trade Commission and National Labor Relations Board make "administrative adjudications of the acts of individuals" (not merely "administrative rule-making") upon which they enter orders directing parties before them to engage in or desist from certain conduct. The agencies' findings are reviewed judicially and, if they are lawful and

supported by evidence, the orders are enforced. In case of any disobedience thereafter, the parties subject to the orders may not relitigate their validity; the only questions open at that stage are whether they had notice of the orders and whether they disobeyed them. As this Court said in response to a similar claim made in *Cox* v. *United States*, 332 U.S. 442, 453, with respect to an order of a Selective Service Board (which is not judicially reviewable before compliance is required see note 7, *supra*): "The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order." See, also, *Yakus* v. *United States*, 321 U.S. 414, 444.

The procedure established by the Subversive Activities Control Act is particularly immune from attack of the sort made here by petitioners because it provides for full judicial review of the underlying order before compliance is required. Hence, a person subject to such an order is not put in the position described by Mr. Justice Lamar in *Wadley Southern Ry. Co.* v. *Georgia*, 235 U.S. 651, 662: "He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order." Petitioners will know whether the Board's orders are void or valid before being required to perform the acts which, if not performed, will subject them to criminal penalties.

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This element also distinguishes the present case from the dissenting views in *United States* v. *Spector*, 343 U.S. 169, on which petitioners rely heavily (Pet. Br. 52–55). Justices Jackson and Frankfurter expressed uncertainty in that case as to whether judicial review of the determination of deportability was available before the alien subject to the deportation order was obliged to comply. 343 U.S. at 178–179. Moreover, although Justice Jackson did speak, at one point in his opinion, of "avoid[ing] jury trial" (343 U.S. at 177), he observed afterward that the deportation finding had not been "made either by a jury trial *or a court decision*" (343 U.S. at 178, emphasis added). In the present case, the determination that petitioners must register will have been reviewed by a court before petitioners are called upon to comply with the orders.

It is, of course, true that the cases involving enforcement of orders of administrative agencies usually involve contempt, and contempt cases are not, strictly speaking, criminal prosecutions. But a contempt defendant is as much entitled to a fair judicial trial of all relevant issues as any criminal defendant. In addition, it would be anomalous if the Constitution required the relitigation of the Board's determination in a criminal prosecution based on such a determination, but not if the statute had provided for judicial enforcement of the Board's order. It could hardly make any constitutional difference whether Congress had decided to authorize the court of appeals to enforce the Board's determination

(based on the same preponderance-of-the-evidence standard of review) by ordering individual members to register or merely to "affirm" that determination. The fact that Congress has given the members the benefit of a full criminal trial (including the guarantees of indictment and trial by jury) when charged with failure to obey the Board's final orders should not produce, as a constitutionally required result, the right to relitigate the administrative determination itself.

If a defendant could collaterally relitigate the correctness of an administrative order, the result would be to interfere seriously with Congress' power to delegate authority to an administrative agency. Any person could flout the administrative determination knowing that the order could be relitigated. The only risk would be that the relitigation would result in the same determination as the agency had previously made, thereby subjecting the defendant to criminal penalties. Thus, the determination would serve only as notice to the public of the facts found and to the members that they faced a criminal trial if they did or failed to do certain things. Since all issues of enforcement would be determined by the courts *de novo*, effective regulatory power would be transferred from the administrative agency, where Congress placed it, to the courts.[20]

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[20] *Wong Wing* v. *United States*, 163 U.S. 228, on which petitioner relies, is clearly inapposite. There, this Court held unconstitutional, under the Fifth and Sixth Amendments, a statute providing for trial by a justice, judge, or commissioner of Chinese aliens for being unlawfully in the United States. Thus, the case was never to reach a court.

In sum, we submit that an individual may challenge a Board order only in the manner Congress has provided—that is, by applying for review in the court of appeals and ultimately in this Court. The defendant in a criminal prosecution, however, can litigate only the question whether he has obeyed the order. He has no right to a *de novo* judicial review of the order itself.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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OCTOBER 1965.

APPENDIX A

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781 *et seq.*, provides in part as follows:

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

* * * * *

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of

a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

* * * * * *

SEC. 3. For the purposes of this title—

* * * * * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

* * * * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * * * *

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * * * * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

* * * * * *

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

* * * * * *

(c) The registration required by subsection (a) or (b) shall be made—

* * * * *

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

* * * * * *

(4) In the case of a Communist-action organization, the name and last known address of each individual who was a member

of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

* * * * * *

SEC. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsections (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

* * * * * *

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title

is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

* * * * *

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

* * * * *

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(i) If after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8,

as may be appropriate; and send a copy of such order to such individual.

* * * * * *

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

* * * * * *

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this Title—

* * * * * *

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register

under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

The Attorney General's applicable regulations provide:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 11—REGISTRATION OF COMMUNIST ORGANIZATIONS AND MEMBERS THEREOF

Order No. 250–61

Administration of Certain Sections of the Subversive Activities Control Act of 1950

DEFINITIONS OF TERMS

Sec.

11.1 Definitions of terms.

GENERAL REQUIREMENTS

11.100 Administration of act assigned to Internal Security Division.
11.101 Computation of time.
11.102 Act and regulations to be considered together.

REQUIREMENTS AS TO REGISTRATION

11.200 Form for registration of organizations.
11.201 Form for Registration Statement of organizations.
11.202 Annual reports.
11.203 Accounting of moneys received and expended.
11.204 Maintenance of books and records.
11.205 Duty of officers.
11.206 Form for registration of individuals.
11.207 Form for Registration Statement of individuals.

REGISTERS

Sec.
11.300 Public inspection of registers.

LABELING

11.400 Labeling of publications.

Pursuant to the authority vested in me by sections 7, 8, 9, and 10 of the Subversive Activities Control Act of 1950 (64 Stat. 993–996; 50 U.S.C. 786–789) and by section 161 of the Revised Statutes of the United States (5 U.S.C. 22), I hereby prescribe the following regulations to carry out the provisions of said sections of the Subversive Activities Control Act of 1950:

DEFINITIONS OF TERMS

Section 11.1. *Definition of terms.* As used in these regulations:

(a) The term "Attorney General" means the Attorney General of the United States.

(b) The term "act" means the Subversive Activities Control Act of 1950.

(c) The term "section" refers to a section of the act.

(d) The term "regulations" refers to all regulations, forms, and instructions to forms prescribed by the Attorney General pursuant to the act.

(e) The term "registrant" means an individual or organization registered under the act.

(f) The term "executive officer" means the individual who directs the course of business of the organization or who outlines the duties and directs the work of subordinate employees and who is responsible for the day-to-day operation of the organization's affairs and for carrying into effect the purposes of his employment.

(g) The term "moneys received" shall include, but shall not be necessarily limited to, all moneys and other things of value received by the registrant from rents, sales, bazaars, benefits, socials, parties, entertainments, gifts, donations, contributions, subscriptions, subsidies, legacies, grants, or funds held in trust for the benefit of the registrant.

(h) The term "moneys expended" shall include, but shall not be necessarily limited to, all moneys and other things of value which a registrant expends by way of purchase, barter, gift, donation, subscription, transfer, conveyance, lease, subsidy, assignment, endowment, or release.

GENERAL REQUIREMENTS

Section 11.100 *Administration of the act assigned to Internal Security Division.*

The administration of sections 7 to 10, inclusive, of the Subversive Activities Control Act of 1950 is assigned to the Internal Security Division, Department of Justice. All communications with respect thereto should be addressed to the Assistant Attorney General, Internal Security Division, Department of Justice, Washington 25, D.C.

Section 11.101 *Computation of time.*

Sundays and holidays shall be counted in computing any period of time provided for in the act or in the regulations.

Section 11.102 *Act and regulations to be considered together.*

In determining any question concerning the application of the act to any person the regulations shall be considered together with the provisions of the act. The regulations shall not be construed to limit the act or to define its full scope or application.

REQUIREMENTS AS TO REGISTRATION

Section 11.200 *Forms for registration of organizations.*

Each Communist-action organization and each Communist-front organization which is required to register with the Attorney General shall accomplish such registration on a form hereby designated as Form IS–51a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D.C. Forms may be obtained in person or by mail.

Section 11.201 *Form for registration statement of organization.*

Registration statements of organizations shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D.C. Filing may be made in person or by mail and shall be deemed to have taken place on the receipt thereof. Such registration statement shall be on a form hereby designated as Form IS–51, copies of which are available at the Internal Security Division.

Section 11.202 *Annual Reports.*

The annual report required by section 7(e) of the act shall be submitted on a form hereby designated as Form IS–53. This form is available on request at the Internal Security Division, Department of Justice, Washington 25, D.C., and may be obtained in person or by mail.

Section 11.203 *Accounting of moneys received and expended.*

The accounting of moneys received and expended as required to be reported by section 7(d)(3) of the act shall be accomplished in the manner prescribed by Form IS–51.

Section 11.204 *Maintenance of books and records.*

(a) Each organization registered under the act shall make and keep current all bookkeeping and other financial records relating to registrant's activities, including cancelled checks, bank statements, and records of income and disbursements, showing names and addresses of all persons who have paid moneys to the registrant or who have received moneys from the registrant, the specific amounts so paid or received, the date on which each item was paid or received, and the purpose for which any item was expended.

(b) Each Communist action organization in addition to keeping the books and records required by subsection (a) of this section shall make and keep current such books and records as will disclose the names and addresses of the members of the registrant, the officers and employees of the registrant, and the names and addresses of persons, other than members, officers, or employees, who actively participate in the activities of the registrant.

Section 11.205 *Duty of officers.*

In the event an organization required to register or file a registration statement or annual report pursuant to section 7 of the act has failed to submit its registration form, registration statement, or annual report to the Attorney General for filing within the time specified by section 7 of the act, it shall be the duty of the following-designated officers of such organization to execute and file, or cause to be executed and filed, the required registration form, registration statement, or annual report, as the case

may be, within ten days after the failure of the organization to do so:

(a) The president, chairman, or other person who is the chief officer of the organization.

(b) The vice-presidents, vice-chairmen, or the persons performing functions similar to the functions of such officers.

(c) The national organizational secretary.

(d) The executive officer or executive director.

(e) The national executive secretary, national secretary or persons performing functions similar to the functions of such officers.

(f) The treasurer, or person performing functions similar to the functions of such officer.

(g) The members of the national board, or board of directors, or other similar governing body of the organization.

Section 11.206 *Form for registration of individuals.*

Each individual required to register pursuant to section 8 (a) or (b) of the act shall accomplish such registration on a form hereby designated as Form IS–52a. This form is available at the Internal Security Division, Department of Justice, Washington 25, D.C., and may be obtained in person or by mail.

Section 11.207 *Form for registration statement of individuals.*

Registration statements of individuals shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D.C. Filing may be made in person or by mail and shall be deemed to have taken place upon receipt thereof. Such registration statement shall be on a form hereby des-

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ignated as Form IS–52, copies of which are available at the Internal Security Division.

REGISTERS

Section 11.300 *Public inspection of registers.* Registration statements filed by individuals pursuant to section 8 of the act and, subject to the provisions of section 9(b) of the act, registration statements and annual reports filed by organizations under section 7 of the act shall be available for public inspection at the Internal Security Division, Department of Justice, Washington 25, D.C., from 10:00 a.m. to 4:00 p.m. on each official business day.

LABELING

Section 11.400 *Labeling of publications.* Any publication transmitted or caused to be transmitted through the United States mails, or by any means or instrumentality of interstate or foreign commerce and required to be labeled pursuant to section 10(1) of the act shall bear the statement required by that section conspicuously marked at the beginning in the English language and in the language or languages used in such publication. The envelope, wrapper, or other container in which such publication is mailed, circulated, or transmitted shall bear the same statement in the English language in the lower left hand portion thereof.

This order supersedes Order No. 4147 of the Attorney General dated October 17, 1950, and Supplement 1 thereto dated November 15, 1950, Order No. 3–53 dated January 29, 1953, and Order No. 57–54 dated August 27, 1954, prescribing regulations governing the administration of sections 7, 8, 9, and 10 of the Subversive Activities Control Act of 1950.

This order shall become effective upon its publication in the *Federal Register*. Compliance with the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) as to notice of proposed rule making and delayed effective date is impracticable, unnecessary, and contrary to the public interest in this instance because (1) to the extent that the regulations prescribed by this order (other than those relating to procedure or practice) differ from existing regulations they relieve restrictions, and (2) such compliance would unduly delay the administration and enforcement of the Subversive Activities Control Act of 1950.

BYRON R. WHITE,
Acting Attorney General.

OCTOBER 3, 1961.

APPENDIX B

The Background and Provisions of the Subversive Activities Control Act

A. THE HISTORICAL BACKGROUND OF THE ACT

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany, and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies* (1938), 38 Colum. L. Rev. 591–622, 725–774. By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies, but of external aggression aided by local Trojan-Horse groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced in various cities of the United States. See *Internal Security Manual,* Sen. Doc. No. 47, 83d Cong., 1st

Sess. (1953), pp. 216–217. In 1934, the investigation was extended to Nazi propaganda activities. *Id.*, pp. 217–218. During the years 1930–1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country" (Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, vol. 4, p. 384).

Also significant were the 1939 hearings before the House Committee on Un-American Activities, in which the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*). Congress had before it the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International,* adopted at the Second World Congress of the Communist International in 1920 (*id.*, vol. 7, pp. 4668–4671).[1] Among the "conditions" which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to

[1] These *Theses, Statutes, and Conditions of Admission* are set forth in *Blueprint for World Conquests as Outlined by the Communist International* (Human Events, 1946), pp. 33–72.

the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6); recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "remove all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).[2]

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International (Hearings before

[2] *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 66–72; Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4669–4671.

a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308-4311, 4667-4668). For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.*, p. 4432),* and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.*, p. 4671)—

> * * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering upon a course leading toward an attempt to split the party, *a course in violation of the 21 conditions and the statutes of the Comintern.* [Emphasis added.]

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual*, Sen. Doc. No. 47, 83d Cong.,

* The full text of this speech is set forth in the Appendix to the Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R. 71st Cong., 2d Sess., part I, pp. 876–882.

1st Sess., pp. 216-219; see also H. Rep. No. 153, 74th Cong., 1st Sess. (1935), p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—*i.e.*, Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)—it was made a criminal offense to advocate the overthrow of the Government by force and violence or to conspire so to advocate.[4] The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registration Act, c. 327, 52 Stat. 631, 22 U.S.C. 611–621, requiring the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated as follows (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 1–2; S. Rep. No. 1783, 75th Cong., 3d Sess., pp. 1–2):

> Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.
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> * * * * * *

[4] The constitutionality of this provision, as applied to a conspiracy charge against eleven of petitioner's national officers for the period from April 1, 1945, to July 20, 1948, was upheld in *Dennis* v. *United States*, 341 U.S. 494.

> This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.
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> * * * * *
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> We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Various difficulties in the enforcement of the Foreign Agents Registration Act (see Report of the Institute of Living Law, 87 Cong. Rec., Appendix, pp. A4417–4419 (1941); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107) resulted in its amendment by the Act of April 29, 1942, c. 263, 56 Stat. 258, which strengthened the provisions and transferred the administration of the Act from the Secretary of State to the Attorney General. The Reports of the Attorney General to Congress on the Administration of the Foreign Agents Registration Act (which are required by 22 U.S.C. 621) detail the operation of that statute.

The purpose of Congress to expose the foreign origin of various propaganda activities was, however, not fully achieved, partly because of an increased tendency to bring information services under the aegis of diplomatic immunity (see Report of the Attorney General on the Administration of the Foreign Agents Registration Act, 1945–1949, p. 8; 1950 Report, pp.

5–6; 1951 Report, pp. 6–7), and partly because of controversy as to the scope of the "agency" covered by the statute. See *Viereck* v. *United States*, 318 U.S. 236, 242; *United States* v. *German American Vocational League*, 153 F. 2d 860, 864 (C.A. 3), certiorari denied, 328 U.S. 833; *United States* v. *Peace Information Center*, 97 F. Supp. 255, 258–259 (D. D.C.). The necessity of proving the fact of agency within the context of a criminal trial made difficult the enforcement of the Act against organizations which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control.

On October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia*, of any organization "subject to foreign control which engages in political activity." The phrase "subject to foreign control" was defined in Section 1 of the Act as follows:

> (e) An organization shall be deemed "subject to foreign control" if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with respect to the purposes of the bill (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 1):

> Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.
>
> * * * * *
>
> The principle upon which this bill is based is that there is no place in a democracy for undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122–133. Since religious, charitable, scientific, literary, and educational organizations were excluded from the Act's coverage, propaganda organizations could seek to avoid registration by styling themselves under one of the excluded categories. There was no express provision making the officers guilty if a corporation or association failed to register. In the case of a corporation or unincorporated association without funds for the payment of fines, there were no appropriate sanctions to enforce compliance. While it was originally anticipated that

both the Communist Party and the German-American Bund would have to register under the Act (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorcement. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (C.P. Ex. 13, p. 15):

> That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representaties as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *.

This disaffiliation and its stated purpose are not disputed by petitioner. Its spurious character was demonstrated by the testimony in this case. See Modified Report of the Board at R. 2510, 2512–2515.

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations believed, with reason, to be subversive but which veiled their true ends behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and

which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression* (1942), 37 Ill. [Northwestern Univ.] L. Rev. 193, 204–205; Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 201; Moore, *The Communist Party of the USA: An Analysis of a Social Movement* (1945), 39 Am. Pol. Sci. Rev. 31, 36–37.

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.[8] Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada led to the establishment of a Royal Commission in Canada to investigate espionage activities being conducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission to Investigate the Facts Relating to and the Circum-*

[8] Some details of this history are set forth in the Government's brief in *Dennis* v. *United States*, No. 336, Oct. Term, 1950, pp. 199–203.

stances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow (*id.*, pp. 11–13). It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent (*id.*, pp. 37–41). The Report quoted a statement by Gouzenko that (*id.*, p. 37)—

> The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *.

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony" (*ibid.*).

The Commission found that the main recruiting ground for espionage agents was the illegally constituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents (*id.*, pp. 44–48, 69–83). Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow (*id.*, pp. 44–48). It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments

of the Canadian government (*id.*, pp. 48–49, 97). Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy (*id.*, pp. 59–68).[6]

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.[7]

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States*, H. Rep. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work (*id.*, pp. 5–7, 15). Testimony by former Communist agents showed that Communist espionage groups had successfully infiltrated certain strategic areas of the Government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of

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[6] Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose* v. *The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer* v. *The King*, 94 Can. Cr. Cas. 195 (1948); *Rex* v. *Maserall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex* v. *Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex* v. *Harris*, [1947] Ont. Rep. 461; *Rex* v. *Smith*, [1947] Ont. Rep. 378; *Rex* v. *Gerson*, [1947] Ont. Rep. 715.

[7] Since the passage of the Subversive Activities Control Act, in September 1950, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage here.

the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States* v. *Hiss*, 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., op. cit., supra,* pp. 31, 35. Later, after the passage of the Subversive Activities Control Act, atomic and radar information was proved to have been passed to the Soviet Union by an international group. See *United States* v. *Rosenberg,* 195 F. 2d 583, 589, 598–601 (C.A. 2), certiorari denied, 345 U.S. 965; see also *Abel* v. *United States,* 362 U.S. 217.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950, 183 F. 2d 201 (C.A. 2), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit, *Dennis* v. *United States,* 341 U.S. 494, without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that

there remained in existence a world Communist movement which endangered the security of the United States.[3] This was the problem with which Congress undertook to deal in the Subversive Activities Control Act of 1950.

B. THE IMMEDIATE EVOLUTION OF THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. Efforts were made to remove objectionable features from early drafts and to define with precision the terms employed without leaving the remedial legislation vulnerable to the kind of calculated avoidance that had been the prime weakness of previous registration statutes.

The so-called "Mundt-Nixon" bill (H.R. 5852, 80th Cong., 2d Sess.) was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948 (94 Cong. Rec. 2893). As amended and reported out, Section 8 of the bill provided for registration with the Attorney General by "Communist political organizations" and "Communist-front organizations." The Attorney General was authorized under Section 15, either on his own initiative or at the request of either House of Congress, to make an investigation and conduct hearings to ascertain whether an organization was required to register.

In its report on the bill, the Committee on Un-American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act

[3] See, in addition to the material referred to in the text, *The Strategy and Tactics of World Communism* (Report of the House Foreign Affairs Committee's Subcommittee No. 5 on National and International Movements), H. Doc. No. 619, 80th Cong., 2d Sess. (1948), pp. 3–4.

of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties" (H. Rep. No. 1844, 80th Cong., 2d Sess., p. 5). It was also stated that, while the Alien Registration Act of 1940—*i.e.*, the Smith Act—made it a crime to advocate the overthrow of the Government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence" (*ibid.*). The report also indicated that ten years' investigation by the Committee had established (*id.*, p. 2)—

> (1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Senate Judiciary Committee, to which the House bill was referred, sought the advice of several prominent lawyers and the then Attorney General as to the constitutionality of the bill (see 94 Cong. Rec. 9028). The legal memoranda received in response to this request are set out at pp. 415–428 of Hearings before the Committee on the Judiciary, Senate, 80th

Cong., 2d Sess., on H.R. 5852; see also *id.*, pp. 428–488.[9] The principal objection of those who thought the bill had constitutional defects was that the bill used such terms as "Communist political organization" and "Communist-front organization" without adequately defining those terms, and therefore furnished the Attorney General with no definite legislative guide in determining whether an organization was required to register.

A new version of the bill was prepared (see 94 Cong. Rec. 9028, 9029–9032). It more specifically defined in its Section 3 the terms "Communist political organization" and "Communist-front organization," and set forth in Section 7 the duty of such organizations to register with the Attorney General and to file annual reports. In place of the provision for an administrative determination by the Attorney General, the new bill (Sections 12, 13) provided for a Subversive Activities Board which was to make the determination as to whether a given organization was required to register, with further provision for judicial review of its determinations.

The redrafted bill—known as the "Mundt-Ferguson-Johnston" bill—was introduced in the First Session of the 81st Congress as S. 2311.[10] The opinions of various prominent attorneys were again solicited and the consensus appeared to be that in respects here relevant the bill met the constitutional objections theretofore raised and at the same time avoided the

[9] See also the analysis of the bill in Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948–1949), 34 Corn. L. Q. 182–219, 352–375.

[10] S. 2311 evolved after extensive hearings before a subcommittee of the Senate Judiciary Committee from S. 1194 and S. 1196, which were originally introduced in the 81st Congress.

weaknesses of prior legislation (S. Rep. No. 1358, 81st Cong., 2d Sess., pp. 7, 16–17).

The Internal Security Act, of which the Subversive Activities Control Act is a constituent part (Title I), was passed on September 23, 1950, over the President's veto. Both the House and Senate committee report reemphasized the pressing need for bringing Communist organizations out in the open through the medium of registration requirements (H. Rep. No. 2980, 81st Cong., 2d Sess., on H.R. 9490; S. Rep. No. 2369, 81st Cong., 2d Sess., on S. 4037; S. Rep. No. 1358, 81st Cong., 2d Sess., on S. 2311). The House committee report reiterated the fact that prior legislation directed to this end had been ineffectual against the Communist Party itself, and cited the fact that 30 of the 70 major countries of the world had outlawed the Communist Party (H. Rep. No. 2980, 81st Cong., 2d Sess., p. 2). The report further noted that the Committee had rejected proposals to outlaw the Communist Party or to make membership therein illegal *per se,* and emphasized that the "Communist organization of the United States" was not made guilty of any offense by reason of the enactment of the Act (*id.,* p. 5).

C. THE STRUCTURE AND PROVISIONS OF THE ACT

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781–798. It has been amended, insofar as it relates to Communist-action organizations and their members, four times—in a relatively minor detail by the Act of July 29, 1954, 68 Stat. 586; again, in a more substantial manner, by the Communist Control Act of August 24, 1954, Sections 6–11, 68 Stat. 775, 777–780; and finally in minor details by the

Acts of August 20, 1958, and May 31, 1962, 72 Stat. 950, 76 Stat. 91. In view of the length of the Act and the complex interlocking of its numerous sections and subsections, a summarization of its principal provisions may be helpful. Rather than a mere section-by-section summary, the effort will be to present an over-all view showing the structure of the Act, with emphasis on the essentials of the registration scheme and the nature of the legal consequences which attach to an organization's act of registering (or being ordered to register) both as they affect the organization itself, considered as an entity, and as they affect individual members of the organization and others.

1. The Congressional findings as to the necessity for the legislation

Section 2 sets forth in fifteen numbered paragraphs certain findings—based on "evidence adduced before various committees of the Senate and House of Representatives"—which convinced Congress of the necessity for the legislation. Congress found, for example, that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (Section 2(1)). The "direction and control" of this movement was found to be "vested in and exercised by the Communist dictatorship of a foreign country," not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes "action orga-

nizations" in various countries, these organizations being part of a world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subservient to the parent dictatorship (Section 2(6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substantial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal "their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'" (Section 2(7)). Finally, Congress found (Section 2(15)):

> The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in

other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

2. *"Communist-action" and "Communist-front" organizations*

"Communist-action organization."—The Act defines a "Communist-action organization" as "any organization in the United States," other than one diplomatically accredited, which "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2" *and* which "operates primarily to advance the objectives" of that movement "as referred to in section 2" (Section 3(3)).

"Communist-front organization."—A "Communist-front organization" is defined as "any organization in the United States" which is "substantially directed, dominated, or controlled by a Communist-action organization" *and* "is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (Section 3(4)).

3. The registration scheme

The heart of the Act—the organizational registration requirement—is contained in Section 7.

The duty of Communist-action and Communist-front organizations to register with the Attorney General.—Each Communist-action organization (Section 7(a)) and each Communist-front organization (Section 7(b)) is required to "register with the Attorney General, on a form prescribed by him by regulations" as the one or the other type of organization. Registration is to be effected within thirty days after enactment of the Act (Section 7(c)(1)), or, in the case of an organization which becomes registerable after the Act's passage, within thirty days after becoming registerable (Section 7(c)(2)). In the case of an organization which does not voluntarily register and which is subsequently ordered to register by the Subversive Activities Control Board, registration must be effected within thirty days after the Board's order becomes final[11] (Section 7(c)(3)).

The registration statement.—The registration process includes the submission of a registration statement, to be prepared in accordance with regulations, containing certain specified information (Section 7(d)). The information is to include (1) the name and address of the organization, (2) the name, address, title, and duties of each officer of the organization, including each person who has been an officer at any time during the preceding year, (3) an accounting of all funds received and spent by the organization during the preceding year, including the sources of the funds and the purposes of the expenditures, (4) (ap-

[11] The process leading to an order by the Board to register is provided for in Section 13. The conditions under which a Board order becomes final are set forth in Section 14(b).

plicable to Communist-action organizations only) the name and address of each member of the organization, including each person who has been a member at any time during the preceding year, (5) any aliases that may ever have been used by any officer or member required to be listed, and (6)[12] a list of all printing presses and other mechanical devices used in printing in the possession or control of the organization, its officers, or members.

Annual reports.—Annual reports are required to be submitted to keep the initial registration statement up to date (Section 7(e)).

Records required to be kept.—Accurate financial records are required to be kept by all registered organizations (Section 7(f)(1)). In addition, action organizations are required to keep accurate membership lists (Section 7(f)(2)).

Remedies open to persons claiming to be wrongly listed.—Section 7(g) provides remedies for persons who are listed by reporting organizations as being officers or members and who deny that they are such. The Attorney General is required to notify all individuals whom reporting organizations list as officers or members that they have been so listed. Any listed individual who denies that he is an officer or member may request the Attorney General to strike his name from the statement. In that event, the Attorney General is required to investigate the matter, and if he is satisfied that the denial is correct, he is to strike the individual's name. If he is not satisfied that the denial is correct and declines to strike the name, or if he fails to strike it within five months after receiving the request, the individual may petition the Board

[12] Added by the Act of July 29, 1954, 68 Stat. 586.

pursuant to Section 13(b) for an order requiring the Attorney General to strike his name.

Publication to constitute notice.—Upon the registration of an organization, the Attorney General is required to publish in the Federal Register the fact that the organization has registered as a Communist-action or Communist-front organization as the case may be (Section 9(d)). Such publication, it is provided "shall constitute notice to all members of such organization that such organization has so registered" (*ibid.*).

Keeping of registers.—The Attorney General is required to keep registers of all organizations which register, consisting of the names and addresses of the organizations and their registration statements and annual reports (Section 9(a)). The registers are to be open to public inspection, except that the name of any person listed by an organization as being an officer or member who denies his status as such may not be made public pending determination by the Attorney General of the correctness of the listing (Section 9(b)).

4. Proceedings before the Board leading to orders requiring organizations to register

Section 13 of the Act provides for quasi-judicial proceedings before the Subversive Activities Control Board leading to orders requiring, or refusing to require, organizations claimed by the Attorney General to be action or front groups to register with him as such. The Board itself is established and its general powers and functions defined in Section 12.

The petition by the Attorney General.—Whenever the Attorney General has reason to believe that any organization which has not registered under Section 7(a) as an action organization or under Section 7(b)

as a front organization "is in fact an organization of a kind required to be registered under such subsection," he is required to file with the Board and serve upon the organization a petition for an order requiring the organization to register (Section 13(a)).

Hearings before the Board.—Upon the filing of such a petition, the Board (or any member or a designated examiner) holds a hearing to inquire into the facts regarding the organization's registerability (Section 13(c)). The administration of oaths and the issuance of subpoenas are provided for (*ibid.*). Hearings are public, and each party is entitled to present its case with the assistance of counsel, to offer oral or documentary evidence, and to cross-examine opposing witnesses (Section 13(d)).

Types of evidence required to be considered.—Section 13(c) sets forth in eight numbered paragraphs certain types of evidence which the Board is required to consider in determining whether an organization is a Communist-action organization under Section 3(3). For example, the Board is to take into consideration:

> (1) the extent to which its [the organization's] policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

Similarly, Section 13(f) sets forth four evidentiary factors required to be taken into consideration in determining whether an organization is a front group under Section 3(4). These factors are the extent to which (1) the persons who are active in managing the

organization are active in managing any Communist-action organization; (2) the organization's financial or other support came from any Communist-action organization; (3) its financial resources and personnel are used to promote the objectives of any Communist-action organization; and (4) the positions taken by it do not deviate from those of any Communist-action organization.

Reports and orders.—If the Board determines that the organization is a Communist-action or Communist-front organization, it must make a report stating its finding of fact and issue an order requiring the organization to register (Section 13(g)(1)). If it determines that the organization is not such a group, it so reports and issues an order denying the Attorney General's petition (Section 13(h)(1)).

Publication to constitute notice.—When an order of the Board requiring registration of a Communist-action organization becomes final, that fact must be published in the Federal Register and such publication is declared to "constitute notice to all members of such organization that such order has become final" (Section 13(k)).

5. The duty of individuals to register under certain circumstances

The Act also imposes upon individuals a duty to register under certain circumstances.

(a) Officers required to effect an organization's registration

If a Communist-action or Communist-front organization should fail to register or to file a registration statement or annual report as required by Section 7, it is the duty of the executive officer and of the secretary of the organization (or the individuals performing the usual duties of such officers), and of such

other officers as the Attorney General may by regulations prescribe, to register for the organization or to file the registration statement or annual report, as the case may be (Section 7(h)). Pursuant to this authority, the Attorney General has designated the following additional officers as sharing with those named in the Act the responsibility of effecting the registration of an organization which is required to register but fails to do so: (a) the president, chairman, or other person who is chief officer; (b) the vice-president, vice-chairman, or person performing the functions of either; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. 11.205.

(*b*) *Personal registration of members of Communist-action organizations*

Conditions under which required.—The Act specifies two conditions under which members of a Communist-action organization are required to register personally with the Attorney General. First, if there is in effect a final order of the Board requiring the action organization to register and more than thirty days elapse without compliance, it becomes the duty of each member of the organization to register personally (Section 8(a)). Secondly, if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, each member not on the list who knows the organization to be registered and to have omitted his name must himself register within sixty days after obtaining such knowledge (Section 8(b)). In either case, the individual is required to file a registration statement containing such information as the Attorney General may by regulations prescribe (Section 8(c)).

Proceedings before the Board.—If an individual who the Attorney General believes is required to reg-

ister under Section 8, does not in fact register, the Attorney General may petition the Board (as in the case of an organization) for an order requiring the individual to register (Section 13(a)).

Hearings.—The Attorney General's petition for an order to require an individual to register is heard by the Board in the same manner as a petition for an order requiring an organization to register (see p. 171 above) (Section 13(c) and (d)).

Reports and orders.—In each instance the Board must make a report stating its findings and issue an order either requiring the individual to register (Section 13(g)(2)) or denying the Attorney General's petition (Section 13(h)(2)).

6. Fact of registration not admissible in any criminal prosecution and membership not to constitute per se a violation of any criminal statute

The fact of the registration of any person as an officer or member of any Communist-action or Communist-front organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). In addition, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute (*ibid.*).

7. Cancellation of registration

The Act establishes procedures whereby an individual or an organization which has once registered—whether with or without an order of the Board commanding him or it to do so—may procure the cancellation of his or its registration in the event of a change in the circumstances which originally required registration.

Application to the Attorney General.—Any organization registered under Section 7 as an action or front group, and any individual registered under Section 8, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration (Section 13(b)).

Petition to the Board.—If the Attorney General denies the application, the organization or individual concerned may, within sixty days after such denial, file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of registration (Section 13(b)).

Hearings.—The petition is heard by the Board in the same manner as a petition by the Attorney General requesting that an organization or individual be directed to register (Section 13 (c) and (d)).

Reports and orders.—In each case the Board must make a report stating its findings and issue an order granting (Section 13(i)) or denying (Section 13(j)) the petition.

8. Judicial review and finality of Board orders

The Act provides that any party aggrieved by any order of the Board be given full opportunity for judicial review either in the United States Court of Appeals for the District of Columbia Circuit or in the circuit of the petitioning party's residence, with the possibility of further discretionary review by this Court on writ of certiorari (Section 14(a)). On such review the Board's findings of fact, if supported by the preponderance of the evidence, are conclusive (*ibid.*).

Exhaustion of judicial review a prerequisite to an order of the Board becoming final.—An order of the Board does not become final, *i.e.*, enforceable, until full opportunity for judicial review has been ex-

hausted or until review is foreclosed by failure to make timely application therefor (Section 14(b)).

9. The legal consequences of an organization's registration or of a final order to register

When an organization registers under Section 7, or when an order of the Board under Section 13 requiring an organization to register becomes final under Section 14(b), the Act provides for the immediate occurrence of certain legal consequences—one affecting the organization as such, the others affecting members of the organization. In addition, upon the registration of an organization or when an order directing it to register becomes final, certain limitations are imposed upon the conduct of officers and employees of the United States and of "defense facilities," as defined in the Act, with respect to their relations with the organization and its members. These various legal consequences may be summarized and classified as follows:

(a) Consequence to the organization as such

The "labeling" requirements.—When an organization is registered or has been finally ordered to register, any publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons must bear on its face and on any wrapper in which it is contained the printed statement "Disseminated by [name of organization], a Communist organization" (Section 10(1)). Similarly, radio and television broadcasts sponsored by the group must be identified as being "sponsored by [name of organization], a Communist organization" (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

(b) Consequences to members of, and contributors to, the organization

Denial of tax benefits.—Persons making contributions to any organization which is registered or has been finally ordered to register may not deduct the amount of their contributions from their gross taxable income notwithstanding any other provisions of law (Section 11(a)), and no such organization may claim any tax-exemption privilege specified in Section 101 of the Internal Revenue Code (Section 11(b)).

Employment restrictions.—Section 5(a)(1) provides that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from (A) concealing or failing to disclose their membership in seeking, accepting, or holding any nonelective federal employment, (B) holding such employment, (C) concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility,[13] (D) working in any defense facility (this clause is applicable only to members of action organizations), or (E)[14] holding office in or being employed by any "labor organization" as defined in the National Labor Relations Act[15] or rep-

[13] A "defense facility" is defined in Section 3(7), as amended by the Act of May 31, 1962, 76 Stat. 91, as any plant, factory, airport, vessel, pier, etc. "designated by the Secretary of Defense pursuant to section 5(b)."

[14] Added by the Communist Control Act of 1954, Section 6, 68 Stat. 777.

[15] *I.e.*, "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152(5).

resenting any employer in proceedings under that Act.

Provisions applicable to aliens.—Alien members of or aliens affiliated with organizations which are registered or have been finally ordered to register are excluded from admission into the United States, are deportable, and are ineligible for naturalization.[16] The joining of or affiliating with an organization so registered or required to register, within five years after naturalization, if naturalization occurs after the effective date of the Immigration and Nationality Act of 1952, is declared to constitute *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of naturalization.[17]

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[16] These provisions were originally contained in Sections 22 and 25 of the Subversive Activities Control Act, which amended the immigration and naturalization laws. They are now contained in the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, Section 212(a)(28)(E) (exclusion) 241(a)(6)(E) (deportation), and 313(a)(2) (G) and (H) (ineligibility for naturalization). If the alien can establish that he did not know the organization in question to be a Communist organization when he joined it and did not acquire such knowledge prior to the time it registered or was required to register, the provisions are by their terms inapplicable, except that members of action organizations are declared ineligible for naturalization without such qualifying language.

[17] As amended and carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 261.

(c) *Consequences to government and defense-facility employees in their relations with the organization and its members*

Contributions to registered organizations forbidden.—When an organization is registered or has been finally ordered to register, officers and employees of the United States and of defense facilities, having knowledge or notice of that fact, are prohibited from contributing funds or services to such group (Section 5(a)(2)(A)).

Counseling violation of employment provisions.—Section 5(a)(2)(B) makes it a punishable offense for an officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to advise or counsel any person whom he knows to be a member of such organization to perform or omit the performance of any act the performance or omission of which would constitute a violation of the employment provisions of Section 5(a)(1).[18]

10. Criminal penalties

Organizations.—Any organization which has been directed by a final order of the Board to register and which fails to do so within the time allowed, or which fails to file a required registration statement or annual report or to keep records as required, is

[18] In addition, the Act provided that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register were prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)) and federal employees were prohibited from using or renewing passports to any individual they knew or had reason to believe were members of such organizations (Section 6(b)). This provision was held unconstitutional in *Aptheker* v. *Secretary of State*, 378 U.S. 500.

punishable for each such offense by a fine of not more than $10,000 (Section 15(a)(1)). Each day of failure to register is a separate offense (Section 15(a)). Each violation of the labeling provisions of Section 10 (see p. 177 above) is similarly punishable (Section 15(c)).

Individuals.—Each individual officer having a duty under Section 7(h) to register or to file a registration statement or annual report on behalf of an organization which has been finally ordered to register (see p. 173 above) is punishable for each failure to fulfill such duty by a fine of not more than $10,000, or imprisonment for not more than five years, or both (Section 15(a)(2)). Each individual having a duty to register personally under Section 8 (see p. 174 above) is similarly punishable, provided there is in effect with respect to him a final order of the Board requiring him to do so (Section 15(a)(2)). In either case, each day of failure to register is a separate offense (Section 15(a)). The willful making of a false statement or the willful omission of a fact required to be stated is similarly punishable (Section 15(b)). Each false statement or willful omission constitutes a separate offense (Section 15(b)(1)), and each listing of the name or address of any one individual is to be deemed a separate statement (Section 15(b)(2)).

Any individual who violates any of the employment provisions or the contributions prohibition of Section 5, or the labeling provisions of Section 10, is punishable for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or both (Section 15(c)).

Act not to affect previously existing criminal statutes.—The Act provides that its provisions are to be

construed as being "in addition to and not in modification of existing criminal statutes" (Section 17).

11. Communist-infiltrated organizations

The Act as originally passed defined and dealt with but two types of "Communist organization" (Section 3(5))—the Communist-action organization (Section 3(3)) and the Communist-front organization (Section 3(4)). The Communist Control Act of 1954, Sections 7–11, 68 Stat. 775, 777–780, amended the Act so as to define a third category of Communist organization, *viz.*, the "Communist-infiltrated organization," and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders "determining" them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final Board order. "Infiltrated" organizations are defined in Section 3(4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in Section 13A. Such orders are reviewable in the same manner as other orders of the Board (Section 13). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in Sections 10, 11, 13A(h), and 13A(j).

12. Separability clause

The Act contains the customary separability clause providing that, if any of its provisions or the application thereof to any person or circumstances is held

invalid, the remaining provisions, or the application to other persons or circumstances of any provisions held invalid as to some, shall not be affected thereby (Section 32).

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IN THE

Supreme Court of the United States

October Term, 1965

No. 3

WILLIAM ALBERTSON and
ROSCOE QUINCY PROCTOR,

Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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